IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11803 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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USHA INTERNATIONAL LTD. - Petitioner
Versus
VIKAS AUTO AGENCY - THROUGH PROPRIETOR - HITESH L SHAH & 1 - Respondents

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Appearance :
MR GM JOSHI for Petitioner.
MR SP MAJMUDAR for Respondent No. 1.
MR BN KESHWANI for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 22/11/2006
ORAL JUDGMENT

1. The petitioner – original judgment creditor has filed this petition under Article 227 of the Constitution of India challenging the order passed by the learned 4th Joint Civil Judge (S.D.), Rajkot below an application Exh. 18 in Special Civil Execution Petition No. 165 of 2001 whereby the petitioner's prayer for attachment of the properties of the respondent No. 1 and grant of permission to sell the said property by issuance of the warrant has been rejected.

2. This Court has issued rule on 21.06.2005. On service of rule, the respondent No. 1 who is original judgment debtor has been represented by learned advocate Mr. S.P. Majmudar and respondent No. 2 Punjab National Bank is represented by learned advocate Mr. B.N. Keshwani.

3. Mr. G.M. Joshi, learned advocate appearing for the petitioner has submitted that the petitioner has filed

Summary Civil Suit No. 4555 of 2001 for recovery of Rs. 6,00,417/- against the respondent No. 1 which was decreed in favour of the petitioner Company. As the respondent No. 1 was situated at Rajkot, the petitioner for the enforcement of the decree transferred the same to the Court of Civil Judge (S.D.), Rajkot and as the judgment debtor was not satisfying the decree, the petitioner preferred an application Exh. 18 for attachment after judgment. He has further submitted that two Bankers, namely, Vijay Commercial Co-operative Bank and Punjab National Bank lodged their objections and on the basis of the same, the learned 4th Joint Civil Judge (S.D.) by order dated 28.02.2005 rejected the application Exh. 18 on the ground that the properties are already attached by the Banks for recovery of certain amount. Though the charge is already created by the Banks on the properties, the claim of the petitioner ought to have been entertained by creating a formal charge and hence the present petition is filed.

4. He has further submitted that in the event of any adverse orders, that may be passed against the Banks by any court of competent jurisdiction, the interest of the petitioner – judgment creditor is required to be protected and, therefore, a formal charge ought to have been created by imposing second attachment on the property in question even if it is assumed that the first attachment was there. He has, therefore, submitted that the impugned order is liable to be quashed and set aside and the application of the petitioner is required to be granted. He has further submitted that Order XXI, Rule 52 deals with attachment of property in custody of Court or Public Officer and it says that where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued. Based on this rule, Mr. Joshi has submitted that by entertaining the application, the

learned Civil Judge ought to have issued notice on the DRT where the application of the respondent No.2 is pending and charge is created in its favour by that forum.

5. Mr. B.N. Keshwani, learned advocate appearing for respondent No. 2 has submitted that the petitioner has suppressed material facts from this Court and hence, the petition is liable to be rejected. The learned Executing Court has already held that properties sought to be attached by execution proceedings were already attached and are seized and in possession of the Court Commissioner / Debt Recovery Tribunal at Ahmedabad in view of the order of attachment dated 23.10.2001 passed in DRT Application No. 424 of 2001 filed on 15.10.2001 for recovery of Rs.50,86,586.40. He has, therefore, submitted that the said properties cannot be attached by the Executing Court. The only remedy available to the petitioner is to approach DRT for obtaining appropriate orders. As a matter of fact, the present petitioner has already approached DRT by

filing application in O.A. No. 424 of 2001 on or about 08.10.2004 i.e. before filing this petition on 04.04.2005, and now the DRT is seized of the matter. He has, therefore, submitted that the present petition cannot be entertained by this Court.

6. Mr. Keshwani has relied on the decisions of the Hon'ble Supreme Court in the case of **Kanhaiyalal V/s. Dr. D.R. Banaji and others, AIR 1958 S.C. 725**, in the case of **Mukherjee Biswa Nath and others, V/s. Samir Kundu and another, AIR 1988 BOMBAY 26** and in the case of **Everest Coal Company Pvt. Ltd. V/s. State of Bihar and others, AIR 1977 S.C. 2304**. Based on these judgments, he has submitted that the present petitioner should approach to the DRT and take appropriate relief from that Forum. He has, therefore, submitted that no interference is called for in the order passed by the learned Executing Court while exercising the powers under Article 227 of the Constitution of India.

7. As a counter to this, Mr. Joshi has submitted that the Court Receiver has not been appointed and only the Court Commissioner was appointed to effect the attachment. In other words, the property is in the custody of the DRT. Since the Receiver has not been appointed, all the judgments cited by the learned advocate Mr. Keshwani are not applicable to the facts of the present case.

8. After having heard learned advocates appearing for the respective parties and after having gone through the impugned order passed by the Executing Court and the authorities cited before the Court, I am of the view that the impugned order does not call for any interference. There is no dispute about the fact that before the application Exh. 18 is moved by the present petitioner before the Executing Court, the property has already been attached. Matter is still pending before DRT. There is also no dispute about the fact that the present petitioner has already approached to the DRT for joining party in the

pending Recovery Application. It is true that Order XXI, Rule 52 requires an issuance of notice to the Court or an officer in whose possession the property sought to be attached is lying. However, Order XXI, Rule 52 has come up for consideration before the Hon'ble Supreme Court in the case of **Kanhaiyalal V/s. Dr. D.R. Banaji and others** (supra), wherein the Hon'ble Supreme Court has held that *Order 21, Rule 52 of C.P.C. Requires that where the property is in the custody of any Court or Public Officer, attachment shall be made by a notice to such Court or officer. But the absence of such a notice would not render the sale void ab initio, because the jurisdiction of the Court or the authority ordering the sale, does not depend upon the issue of the notice of attachment. It is also settled law that proceedings taken in respect of a property which is in the possession and management of a Receiver appointed by Court under O. 40, R. 1 of C.P.C., without the leave of that Court, are illegal in the sense that the party proceeding against the property*

without the leave of the Court concerned, is liable to be committed for contempt of the Court, and that the proceedings so held, do not affect the interest in the hands of the Receiver who holds the property for the benefit of the party who, ultimately, may be adjudged by the Court to be entitled to the same. The Court has further observed that the general rule that property in custodia legis through its duly appointed Receiver is exempted from judicial process except to the extent that the leave of that Court has been obtained, is based on a very sound reason of public policy, namely, that there should be no conflict of jurisdiction between different Courts. If a Court has exercised its power to appoint a Receiver of a certain property, it has done so with a view to preserving the property for the benefit of the rightful owner as judicially determined. If other Courts or Tribunals of co-ordinate or exclusive jurisdiction were to permit proceedings to go on independently of the Court which has placed the custody of the property in the hands of the Receiver, there was a likelihood of confusion in the

administration of justice and a possible conflict of jurisdiction.

9. The interpretation of Order XXI, Rule 52 has also come up before the Bombay High Court in the case of **Mukherjee Biswa Nath and others, V/s. Samir Kundu and another** (supra), wherein it is held that *an attachment which is levied in respect of the property in possession of the Court Receiver without complying the requirement of Order 21, Rule 52 would not be a valid attachment in law. It is, of course, open to the plaintiffs to take requisite steps under Order 21, Rule 52 for attaching the said property or to obtain the leave of the High Court for selling the said property.*

10. The Hon'ble Supreme Court has also an occasion to deal with Order 40, Rule 1 in the case of **Everest Coal Company Pvt. Ltd. V/s. State of Bihar and others** (supra) wherein it is held that *when a Court puts a Receiver in possession of property, the*

property comes under Court Custody, the Receiver being merely an officer or agent of the Court. Any obstruction or interference with the Court's possession sounds in contempt of that court. Any legal action in respect of that property is in a sense such an interference and invites the contempt penalty of likely invalidation of the suit or other proceedings.

11. Based on the aforesaid judgments, it is obligatory on the part of the petitioner to approach DRT under whose order these very properties were attached first in point of time. Since the present petitioner has already moved before DRT for joining party, similar such prayer can also be made before that forum for recording its charge and/or attachment over the property. In the above view of the matter, there is no infirmity in the order passed by the learned Executing Court refusing to attachment and/or grant permission to sell the properties of the respondent No. 1.

12. Since the impugned order does not warrant any interference by this Court in a petition under Article 227 of the Constitution of India, the same deserves to be dismissed and is accordingly dismissed. Rule discharged without any order as to costs.

[K.A. PUJ, J.]

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